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90-1306

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

KING ISLAND NATIVE COMMUNITY,

PETITIONER,

V.

STATE OF MONTANA

DEPARTMENT OF FAMILY SERVICES,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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February, 1991

QUESTIONS PRESENTED

1. May a state court use a best interest of the child test to deny a transfer of jurisdiction to an Alaska Native Village under the Indian Child Welfare Act, 25 U.S.C. §1911(b)?

2. May state procedure be used to deny a tribe rights granted under the Indian Child Welfare Act, 25 U.S.C. §1901 et seq.?

a. Does a state court "put the cart before the horse" by examining the merits of a particular placement for a Native child prior to ruling on a request to transfer jurisdiction to the child's tribe?

b. May a state court deny a tribe's request for a transfer of jurisdiction based on facts that arose after the tribe requested the transfer of jurisdiction?

PARTIES

The parties to the proceedings below were: Petitioner King Island Native Community, Respondent State of Montana Department of Family Services, Elizabeth M. natural mother of Teresa S., and Bradley Parrish, Esq. guardian ad litem of Teresa S.

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IN THE
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No. _____

KING ISLAND NATIVE COMMUNITY,
PETITIONER,

V.

STATE OF MONTANA
DEPARTMENT OF FAMILY SERVICES,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

The King Island Native Community respectfully petitions this Court for a writ of certiorari to review the judgment of the Montana Supreme Court in *In the Matter of T.S.*, Case No. 90-057, (Montana Supreme Court, November 20, 1990).

OPINIONS BELOW

The decision of the Montana Supreme Court is reported at ____ Mont. ____, 801 P.2d 77 (1990) and a copy is provided in the Appendix starting at page A1. The decision modified the decision of the

Montana Supreme Court entered October 11, 1990. A copy of the October 11, 1990 decision is provided in the Appendix starting at page A17. The decision of the trial court is unpublished, but a copy is provided in the Appendix starting at page A28.

JURISDICTION

The decision of the Montana Supreme Court was entered on November 20, 1990, denying the Petitioner's request for a rehearing and modifying the court's opinion of October 11, 1990. This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves provisions of the Indian Child Welfare Act, 92 Stat. 3071, now codified at 25 U.S.C. § 1901 et seq., (hereafter ICWA or the Act.) which provide for the transfer of jurisdiction of an Indian child custody case to the Indian child's tribe. The pertinent portion of the Act, 25 U.S.C. § 1911(b), provides:

In any State court proceeding

> for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

Other cited portions of the Act are set out in the Appendix (A44- A52).

STATEMENT OF THE CASE

This is an Indian Child Welfare Act (ICWA) case. The action below seeks to terminate the parental rights of an Eskimo mother to her Eskimo child. The mother, Elizabeth M., is a member of the King Island Native Community (the Tribe) and her daughter, Teresa S. is eligible for enrollment in the Tribe (App. at A36). The mother and child lived in a Native section of Anchorage, Alaska until the

summer of 1988 when they moved to Montana. They had been in Montana approximately one month when this action was initiated by the State of Montana Department of Family Services in the Tenth Judicial District Court, Fergus County on September 2, 1988 (App. at A33, Item 1). Shortly after this action was started the mother returned to Alaska (App. at A3). Petitioner Tribe was not served with process or given other notice of the proceeding. The trial court docket (App. at A32-A36) does not reflect service on the Tribe. The Tribe learned of the proceeding when informed by the mother in November 1988 after she returned to Alaska. The tribe initially intervened orally by telephoning and requesting that the child be placed in Alaska[1] (App. at A38). On December 27, 1988, the tribe intervened in writing (App. at A3). Two days later the state filed a petition seeking to terminate the mother's parental rights. The Tribe made informal efforts to have the child placed in Alaska pursuant to the Interstate Compact on Juveniles (App. at A39). *See* 42 U.S.C. § 673a; Mont. Code Ann. § 41-4-101. On February 21, 1989, when those efforts appeared

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[1]The Guidelines to the Act allow for oral intervention. Guideline C.1, 44 Fed. Reg. 67590 (1979).

fruitless, the Tribe moved the trial court to transfer jurisdiction to the tribe pursuant to the Indian Child Welfare Act, 25 U.S.C. §1911(b). The state contested the transfer of jurisdiction. The month after the Tribe requested a transfer of jurisdiction, the state placed Teresa S. in a pre-adoptive home in Lewistown, Montana (App. at A40). The proposed adoptive mother is part Indian but is not from the child's tribe nor another Eskimo tribe; the proposed adoptive father is non-Indian. They do not live in an Indian community. The State did not consult with the Tribe to find a foster family from the Tribe. *See* 25 U.S.C. §1915.

At the hearing on the motion to transfer jurisdiction, the state argued that the child had bonded with the proposed adoptive parents and that the transfer would not be in the child's best interest[2]. When no ruling had been made on the Tribe's motion by December 1, 1988, 13 months from the first telephonic request, the petitioner sought an extraordinary writ from the Montana Supreme Court to

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[2]The guardian ad litem urged the trial court not to follow *Mississippi Band of Choctaw Indians v. Holyfield, 490* U.S. 30 (1989), terming the decision "grotesque". (App. at A41, A44).

compel a ruling on the motion (App. at A35, Item 23 1/2). The trial court then denied the motion to transfer jurisdiction primarily on the grounds that the child was, by the time of the trial court's decision, "adapted to her home now, and the [foster] family desires to adopt her as soon as possible." (App. at A31) The trial court also cited as grounds for denial the court's perceived difficulty of presenting witnesses and evidence in the tribal court.

The Montana Supreme Court dismissed the petition for the extraordinary writ as moot after learning of the trial court's decision. The Petitioner made a timely motion in the trial court to reconsider the refusal to transfer jurisdiction. This motion was denied on January 9, 1990. An appeal was then taken to the Montana Supreme Court which affirmed the decision of the trial court.

FEDERAL QUESTION RAISED

Petitioner raised the federal question in the trial court on February 21, 1989 by petitioning the trial court to transfer jurisdiction of the action to the tribal court (App. at A34, Item 11). This was also an issue raised in the appeal of

the case to the Montana Supreme Court. (App. at A2).

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Conflicts With the Recent Decision of this Court in *Holyfield* as well as Other Decisions of This Court in the Area of Indian Law.

In *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), this Court stated that in determining jurisdiction in Indian Child Welfare Act cases courts are "to decide the legal question of *who* should make the custody determination concerning these [Indian] children - not what the outcome of that determination should be." *490 U.S.* at 53. (Emphasis in original). In contrast, in the decision below the Montana court held: "In Indian child cases such as this, the first step is to determine the § 1911(b) jurisdiction issue by applying a 'best interest of the child' test ..." (App at A8). These decisions cannot be reconciled.

In *Holyfield*, this Court took the opportunity to explore the overall parameters of the ICWA. Although *Holyfield* turned on an interpretation of the exclusive jurisdiction provision of the Act,

section 1911(a), the case was equally instructive regarding a proper interpretation and application of section 1911(b), the transfer of jurisdiction provision at issue in the present case. When referring to that provision, this Court noted that "Section 1911(b) ... creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation ..." *490 U.S.* at 36. The Montana court erred in dismissing *Holyfield* out of hand as having no application outside a section 1911(a) situation. (App. at A13).

The use of a best interest of the child test for making transfer determinations ignores two of the central themes and key admonitions given by this Court in *Holyfield*: (1) Jurisdiction cannot be determined by looking to the merits of a particular placement. *490 U.S.* at 53-54. Thus, factual determinations which prejudge the merits (an inherent and unavoidable result of using a best interests of child analysis), are unacceptable. (2) State law or practice which tends to undermine the ICWA's purposes can not be taken to express Congress's intent. 490 U.S. at 51 n.26; H.R. Rep. No. 1386, 95th Cong., 2nd Sess., 17-18 (1978).

The ICWA is remedial in nature, curtailing state authority regarding Indian

child placements, and in most cases putting that authority where it properly belongs - with Indian tribes. *Holyfield, 490 U.S.* at 45 n.17. Rather than following the presumption in favor of tribal jurisdiction, the Montana court determined that state courts have flexibility in section 1911(b) cases since the Act included a "good cause" exception, and because the BIA Guidelines are non-binding. Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979). Such an analysis is flawed for numerous reasons.

First and foremost, state court "flexibility" is just the opposite of the uniformity Congress intended.

> Indeed, the Congressional findings that are a part of the statute demonstrate that Congress perceived the states and their courts as partly responsible for the problem it intended to correct. *See* 25 U.S.C. § 1901(5) (state "judicial bodies ... have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families"). **Under these circumstances it is most improbable that Congress would have intended to**

> **leave the scope of the statute's key jurisdictional provision subject to definition by state courts as a matter of state law.**

490 U.S. at 45 (emphasis supplied) (footnote omitted).

Second, the best interest of the child test focuses solely on the child; it does not consider the tribe's interest in its children, the tribe's most valuable resource. 25 U.S.C. § 1901(3). This interest was recognized at least twice in *Holyfield*. 490 U.S. at 49, 54. The "flexibility" Montana seeks is the right to apply a test not found in the Act[3] to the exclusion of interests the Act seeks to protect.

Additionally, the use of Montana's "jurisdictional best interest of the child" test at this stage of the proceedings totally blurs the purpose of a jurisdictional hearing. The inevitable result will be precisely what happened in this

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[3]The Act does not allow a state to terminate parental rights on a best interest of the child test, 25 U.S.C. §1912(f), nor do the Guidelines list a best interest of the child test as "good cause" not to transfer jurisdiction. Guideline C.3

case - the courts will examine and apply disposition or placement factors to decide the jurisdictional issue. The mere use of a best interest test allows a state to impose non-Indian values in determining jurisdiction. "Moreover, judges too may find it difficult utilizing a vague standard like 'the best interest of the child,' to avoid decisions resting on subjective standards." *Smith v. Offer, 431 U.S. 820, 835 n.36 (1977).*

The use of the best interest test was particularly egregious in the present case in that the Court virtually granted an adoption to the child's foster parents (App. at A31) without ever requiring the showing mandated by the Act and state law to terminate parental rights. 25 U.S.C. § 1912(f); Mont. Code Ann. § 41-3-609.

In addition to conflicting with the *Holyfield* decision, the Montana court's decision also conflicts with other decisions of this Court. The opinion below necessarily assumes that the tribal court either is not competent to decide the case, or is unwilling to act in the child's best interests, or both. Such a determination runs directly contrary to well settled law and policy which specifically recognize the competency of tribal courts and tribal institutions. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, at

65-66, (1978); *see also, Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); *Fisher v. District Court*, 424 U.S. 382 (1976). If the state recognized and respected the competency of the tribal court, it would not have to refuse transfer of jurisdiction to protect what it perceives as the best interests of the Native child.

Similarly, the tribal court is in the best position to know its ability to deal with problems that may arise from having witnesses located in Montana. The tribe can take testimony by deposition or by telephone. If the tribe determined it would be more convenient to have the case heard in Montana, it could send a tribal judge to Montana, or could appoint a judge from a local tribe or a resident Indian lawyer to act as a special master to take testimony and make findings after hearing the matter in Montana. *See* Guidelines at C.3, Commentary.

The decision of the Montana court assumes that the tribe would be unable to overcome whatever difficulties might be presented by distant witnesses, once again implying that the tribal court is not competent to deal with such problems. The perceived competency of the tribal court is not a factor to be considered by state courts. Guidelines at C.3(c). *See also*

LaPlante, 480 U.S. at 19.

No matter how a state tries to carve out or create a special "jurisdictional" best interest of the child test, as Montana has now done, the use of such a test unavoidably reaches directly into the forbidden inquiry regarding outcome, or placement of the Native child.

II. The Decision Below Directly Contravenes Important Federal Interest Regarding the Establishment and Implementation of Federal Indian Policy.

The ICWA is an exercise of federal plenary authority to define the jurisdictional boundaries between two members of our federal system: states and tribes. The power of Congress to legislate in the area of Indian Affairs is plenary. *Santa Clara Pueblo v. Martinez* 436 U.S. 49 (1978); *Talton v. Mayes* 163 U.S. 376 (1896). And the power to define the relation between the tribes and states is exclusive. *Kennerly v. District Court*, 400 U.S. 423 (1971). By establishing its own best interest of the child test for determining when to allow tribal jurisdiction, the Montana Court has shifted the jurisdictional boundary that Congress established in the ICWA.

The decision below, allowing the bonding between a Native child and foster parents to be used as good cause not to transfer jurisdiction to the tribe, effectively makes state compliance with section 1911(b) discretionary. If state social service personnel do not wish to apply the federal law, they need only seek to delay a ruling on a request for transfer of jurisdiction until the Native child is integrated into the foster family. Under the Montana Court's ruling, if a decision on the jurisdictional issue is delayed, and the child becomes established in a given placement, this delay, whether intentional or the result of institutional failure, then becomes good cause not to transfer.[4]

This puts the power to evade the federal law in the hands of state officials or other parties who, by merely

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[4]This standard is apparently different from that applied by Montana in non-ICWA cases. Montana does not allow delay or the child's incorporation into a foster home to be considered by a trial court in determining a non-ICWA child neglect case. *In the Matter of Fish*, 174 Mont. 201, 208, 569 P.2d 924, 928 (1977). "A child cannot be adversely possessed as can a piece of real property."

protracting the litigation, can develop the good cause that did not previously exist. The ruling invites complacency, if not outright intentional non-compliance with the letter and spirit of the Act.

The second rational of the decision below, that a transfer of jurisdiction would work a hardship on witnesses, is similarly flawed. If a trial court cannot, or does not, act promptly on a tribe's or parent's request to transfer, the case may develop to the point that many of the witnesses are in the state.[5] Once again state procedure, or delays in state procedure, are used to avoid federal law.

Such a situation is unacceptable, for, as this Court has stated, "The law of the United States cannot be evaded by the forms of local practice...." *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923). *See also Brown v. Western Ry. Co.*, 338 U.S. 294 (1949) ("Substantive rights" granted by Congress cannot be

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[5]The short period of time the mother and daughter had been in Montana when this action started does not meet the jurisdictional residency requirement for Montana's Uniform Child Custody Jurisdiction Act (UCCJA). Mont. Code Ann. § 40-7-103(5). *See also*, 28 U.S.C. §1738A(b)(4).

defeated by local practice and procedure.)

Implicit in the jurisdictional scheme established by Congress in Sections 1911(a) and 1911(b) of the ICWA, is the recognition of the Federal Government's longstanding policy of encouraging tribal self-governance and the development of tribal courts. *Williams v. Lee, 358 U.S. 217, 220 (1959); LaPlante,* 480 U.S. at 14 ("Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development.") Montana's jurisdictional best interest of the child test does considerable violence to this well established law and policy. The situation is analogous to *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), in that the "current federal policy is to promote precisely what [the state] seeks to prevent." *Id.*at 220.

III. The Decision Below is in Conflict with Decisions of Other States Which do not Allow the Best Interest of the Child to be a Factor in Determining Jurisdiction.

States are in direct conflict over the use of a best interest standard by state courts. Some states have refused to

state courts. Some states have refused to consider best interests at the time a parent or tribe requests a transfer of jurisdiction, believing that the tribal court is the appropriate forum to make that determination. *In the Matter of Armell,* 550 N.W.2d 1060 (Ill App. 1st Div.), *cert. denied,* ____U.S. ____, 111 S. Ct. 345 (1990); *In the Matter of B.W.*, 454 N.W.2d 437 (Minn. App. 1990). Such a policy allows the tribe to weigh the harm to the child of being removed from a particular placement against the harm of the child being raised in a non-tribal setting. *Armell*, 550 N.W.2d at 1066.

An Arizona court, finding both section 1911(a) and (b) applicable noted that the proper forum to determine parental fitness was the tribal court. *Matter of Appeal in Pima County Juvenile Action* 635 P.2d 187 (Ariz. App 2nd Div. 1981), *cert. denied,* 455 U.S. 1007 (1982). When it was argued that the child had been incorporated into a proposed adoptive home, the Arizona court responded:

> Any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act. **The evil which Congress sought to remedy by**

> **duct here under the guise of "the best interest of the child."**

Id. at 193 (Emphasis supplied).

The Utah Supreme Court, in what this Court has recognized as a "scholarly and sensitive opinion," *Holyfield,* 490 U.S. at 52, has rejected the notion that bonding between an Indian child and adoptive parents can be used as a basis of state court jurisdiction. *In re the Adoption of Halloway,* 732 P.2d 962 (1986). "Such a standard would reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation." *Id. at 972.* Utah recognized it should "defer to the experience, wisdom and compassion " of the tribal court. *Id.*

Other states, including Montana, have found that a state court can determine the best interest of the Indian child and use that determination to deny a transfer of jurisdiction to the Indian child's tribal court. *In the Matter of M.E.M.,* 195 Mont. 329, 635 P.2d 1313 (1981); *In Re Adoption of T.R.M.,* 525 N.E.2d 298 (Ind. 1988); *Interest of J.J.,* 454 N.W.2d 317 (S.D. 1990); *In Re Robert T.,* 246 Cal. Rptr. 168, 175 (Cal. App. 6th Dist. 1988).

Petitioner believes the reasoning of these cases is flawed since it requires

the state court to determine the ultimate disposition of the case before a hearing on the merits. Petitioner questions whether a state trial court will apply the requisite standard of proof on the merits if it has, in a jurisdictional hearing, determined that the best interest of the child is served by a particular placement. In this case, the trial court found that removal of the child from the pre-adoptive home would devastate the child and that the foster parents desired to adopt Teresa as soon as possible (App at)[6]. The court made this determination before applying 25 U.S.C. § 1912 which sets the standard of proof needed to remove a child from an Indian parent and before the placement preferences of § 1915 are applied.

The ICWA is directed at state court jurisdiction over actions involving custody of Indian children. Obviously, those actions only arise in state courts. Be-

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[6] This also violates other federal policy. State courts are prohibited from making a determination of a specific placement of any child, Indian or non-Indian. Federal law requires that such determination be made by a state social service agency, 42 U.S.C. § 672 (a)(2), or tribal organization, 42 U.S.C. § 628.

cause principles of res judicata prevent review of state court actions in a federal court, *Lewis v. Kiowa Tribe* 777 F.2d 587 (8th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986), the only method to obtain federal review and achieve the uniformity Congress intended, is to have those conflicts reviewed by this Court. Since this federal issue will not be heard in the federal circuits, a conflict between the states should be viewed as seriously as a conflict among the circuits.

CONCLUSION

For these reasons, the Petition for Certiorari should be granted and the matter should be set for plenary review.

Respectfully Submitted,

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February, 1991

APPENDIX

A. REVISED OPINION

NO. 90-057
IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990

IN THE MATTER OF T.S.
Youth in Need of Care.

APPEAL FROM: District Court of
the Tenth Judicial District,
In and for the County of Fergus,
The Honorable Peter L. Rapkoch,
Judge presiding.

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Submitted on Briefs: August 23, 1990
Decided: November 20, 1990
Filed: November 20, 1990

Justice Fred J. Weber delivered the Opinion of the Court.

King Island Native Community, an Eskimo

tribe located in Nome, Alaska, appeals from a judgment of the District Court, Tenth Judicial District, Fergus County, denying the Tribe's motion to transfer jurisdiction of child custody proceedings of any Eskimo child un the Indian Child Welfare Act. We affirm.

The issues presented are:

1. Did the District Court err when it held that there was good cause not transfer jurisdiction of child custody proceedings to King Island Tribal Court?

2. Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem expressed misgivings about the ICWA?

T.S. was born in Alaska to a mother who is part Eskimo and is eligible for membership in the King Island Native community (Tribe). Neither Mother nor T.S. is a member of the Tribe and neither have ever resided on the reservation during the lifetime T.S. The record reveals a long history of transient lifestyle which was punctuated with domestic violence and physical abuse during the marriage of Mother and Stepfather. The evidence indicated that Mother was abused by Stepfather and T.S. was abused by both Mother and Stepfather.

Mother and Stepfather were residing in Fergus County, Montana on August 31, 1988, when T.S. was placed in protective custody by the Montana Department of Family Services (Department). T.S. was three and a half years old at the time. A petition for temporary investigative authority was

filed and on December 2, 1988, the District Court appointed a guardian ad litem for T.S. and issued its order for protective services and order to show cause.

Shortly after T.S. was placed in a temporary foster home, Mother returned to Alaska. Mother contacted the Tribe and requested that the Tribe intervene in her case pursuant to the Indian Child Welfare Act (ICWA). On December 27, 1988, the Tribe filed a motion to intervene in the proceedings pursuant to 25 U.S.C. § 1911 (c) of the ICWA and intervention was granted the following day. On December 29, 1988, the Department of Family Services filed a petition for permanent legal custody of T.S. and for termination of Mother's parental rights. On February 21, 1989, the Tribe filed a motion to transfer jurisdiction to its tribal court pursuant to 25 U.S.C. §1911(b). Mother joined the transfer request on March 10, 1989. A hearing to determine the jurisdictional issue was held on July 19, 1989. The District Court denied the Tribe's best interests to transfer jurisdiction, and 2) it would constitute an undue hardship to the parties and witnesses in Montana to appear in tribal court in Alaska.

Did the District Court err when it held that there was good cause not to transfer jurisdiction of child custody proceedings to King Island Tribal Court?

Section 1911(a) and (b) of the Indian

Child Welfare Act states:

An Indian Tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of ether parent or the Indian custodian or the Indian child's tribe; **Provided**, That such transfer shall be subject to declination by the tribal court of such tribe. (Emphasis supplied.) 25 U.S.C. §1911(a), (b).

Since T.S. was not domiciled or residing within the reservation, subsection (b) applies which requires

transferring jurisdiction in the absence of good cause to the contrary. This Court has held that in cases that fall under subsection (b):

> The burden of showing "good cause to the contrary" must be carried by the State with clear and convincing evidence that the best interests of the child would be injured by such a transfer, We direct the District Court to consider the guidelines for state courts established by the Department of the Interior in its determination,
> although in addition thereto the best interest of the child could prevent transfer of jurisdiction upon a "clear and convincing" showing by the State.
> In the Matter of M.E.M Youth in Need of Care (1981), 195 Mont. 329, 336, 635 P.2d 1313, 1317.

The guidelines for state courts referred to in M.E.M. state:

> Determination of Good Cause to the Contrary
> (a) Good cease not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:
> (i) The proceeding was at an advanced stage when the petition to transfer was

received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian Child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little nor no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.
44 Fed.Reg. 67591 (1979)

These guidelines were drafted by the Bureau of Indian Affairs (BIA) and represent the Department of Interior's interpretation of what grounds would establish good cause. In the introduction, the Department of Interior states the guidelines are "not published as regulations because they are not intended to have binding legislative effect." 44 Fed. Reg. 67584 (1979). Courts are "free to act contrary to what the Department has said if they are convinced that the Department's guidelines

ar not required by the statute itself." Id. "Primary responsibility for interpreting..... Language used in the Act... rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Id.

In exercising this flexibility, this Court has determined that the "best interests of the child" test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b). M.E.M. at 336, 635 P.2d at 1317. This "best interests of the child" test applied under § 40-4-212, MCA, in custody determinations between parents in a dissolution. It should also not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent - child legal relationships under Title 41, Chapter 3, MCA.

In Indian child case such as this, the first step is to determine the § 19111 (b) jurisdiction issue by applying the "best interests of the child" test and considering the BIA Guidelines to determine good cause. M.E.M. at 336, 635 P.2d at 1317. The next step is to hold a temporary dispositional hearing under § 41-3-404, MCA, to represent the child's interests. The final step under Title 41,

Chapter 3, is for the court to determine whether the parent-child legal relationship should be terminated under the criteria listed in § 41-3-609, MCA. This stage of the proceedings also requires the appointment under § 41-3-607(3), MCA, of a guardian ad litem to represent the child's best interests.

In this case the proceedings are still at the jurisdictional level and the District Court properly applied the jurisdictional "best interests of the child" test and considered the BIA Guidelines.

The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test. She resides in a home the mother in Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.

The Tribe argues that there is a profound difference between the culture of the Eskimo and the Indian culture of the foster mother and that difference makes it in T.S.'s best interests that jurisdiction be transferred. In essence the tribe argues that § 1915 of the ICWA presumes

that it is in the best interests of T.S. that jurisdiction be transferred. 25 U.S.C.§§ 1915, 1303 (1) (iii), (iv). Section 1915(b) suggests preferential foster care placement of an Indian child. That section states:

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with--

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) and Indian foster home licensing authority; or

(iv) and institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

In this case T.S.'s maternal grandmother is unable to provide a home for T.S. and there are no other available family members known to the court. The Department of Family services has made a good faith attempt to comply with the

recommended preferential treatment by placing T.S. in a foster home within reasonable proximity to the child's home in Fergus County and with an Indian foster mother who is fully capable and willing to teach T.S. about her Indian heritage. This Court notes that at the time of the placement, Fergus County was the child's home. Mother did not move to Alaska until after the child was placed in the temporary foster home pending temporary investigative authority and protective proceedings under § 41-3-402, MCA. The Tribe has not had contact with T.S. and has never shown any interest or concern for the living conditions that T.S. has been subjected to. The Tribe insists that it has had contact with T.S. and her Mother and also insists it has not intervened in T.S.'s behalf because it did not know of T.S.'s plight. The Tribe cannot have it both ways. There was no evidence in the record to indicated the Tribe has had any contact with T.S. or her Mother until it received notice of the pending matter in Montana courts. The District Court pointed out:

. . . it is obvious from testimony adduced at the hearing and the record that the Tribe showed little or no interest in [T.S] and [her mother] prior to this action being filed. There is a long and sad history of abuse and neglect of [T.S] in the State of Alaska. There was also Social Service involvement with this family in Alaska with no intervention or

help for [T.S] by the Tribe.

The District Court correctly concluded that it was not in the child's best t interest to remove her from the only stable, loving home she had known and send her to an isolated community with which she had never had previous contact. The Tribe claims there has been an intentional delay resulting in a greater period in which bonding has occurred in the foster home, thus suggesting that the failure to immediately transfer jurisdiction has been improper. The record does not demonstrate any intentional delay. The record does demonstrate careful examination by both the Department and the District Court and a vital and proper concern for this Indian child who has been abused the greater part of her life. While it is true that Mother has joined the Tribe's request for transfer, the evidence unfortunately shows Mother to be unable to adequately protect and care for this child. We note that the Tribe submitted not factual basis to allow the District Court to find under the BIA Guidelines or under the best interests of the child test other than that it is in the child's best interests that jurisdiction remain in Montana. We detect nothing in the proceedings to indicate animosity or lack or respect for the Tribe. Concern for the best interests of the child has been the motivating force for both the Department and the District Court.

Under the Guideline the District Court

determined that subsection (b) (iii) applies, which states that good cause not to transfer exists if the evidence necessary to decide the case could not be adequately presented to the court without undue hardship to the parties or the witnesses. 44 Fed.Reg 67591 (1979). The witnesses and evidence upon which the Department of Family Services' action was filed are all located in Montana. The District Court concluded that it would constitute an undue hardship if the parties and witnesses were required to travel from Montana in order to appear in Tribal Court in Alaska. We conclude there is substantial evidence to support that conclusion.

The Tribe argues that the court has over looked the recommendation of the Department's Indian Child Welfare Specialist concerning transfer of jurisdiction. The Specialist's testimony was not presented at the jurisdictional hearing. The Tribe attempted to bring in the Specialist's recommendation through a post-hearing motion to reconsider on grounds of new evidence. No evidence was presented in the subsequent hearing on the motion to reconsider to show that the Specialist's testimony was unavailable at the time of the jurisdictional hearing, and therefore the evidence is snot properly before the Court. In addition, cross examination of the Specialist at the hearing on the motion for rehearing, revealed that the Specialist had reviewed some unidentified file material but not he

entire file or the transcript of the jurisdictional hearing. No evidence indicated the Specialist had interviewed T.S., her mother, or the foster parents. Without a proper foundation to support the Specialist's recommendation, the court would have properly not considered the Specialist's recommendation when applying the best interests of the child test had the evidence been properly before the court. The court correctly denied the motion for reconsideration and properly disregarded the Specialist's recommendation.

The Tribe argues that a 1989 United States Supreme Court ruling mandates transfer of jurisdiction. Mississippi Bank of Choctaw Indians v. Holyfield , No. 87-980, slip op. (U.S. Sup.Ct., Apr.3, 1989.) Holyfield was a § 1911(a) and Holyfield do not control. There is a valid distinction between a § 1911(b) case such as we have here and a §1911(a) case such as Holyfield. When the child has been domiciled on the reservation and has significant contacts with the Tribe it is reasonable to assume that jurisdiction should be transferred to the Tribe. In this case we have the opposite circumstances which § 1911(b) is meant to address. T.S. has never lived on the reservation, is not a member of the Tribe and has never had any contact whatsoever with the Tribe. The record demonstrates a total absence of evidence demonstrating that it is in T.S.'s best interests that jurisdiction be transferred to the Tribe.

We hold that the District Court did not err in determining that the best interests of T.S. and undue hardship on parties and witnesses constitutes good cause not to transfer jurisdiction.

II

Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem express misgivings about the ICWA?

The Tribe did not request the removal of the guardian ad litem and may not now predicate error on the District Court's failure to take such action. In addition, the District Court admonished the guardian ad litem that his thoughts on the ICWA were irrelevant and would be treated as such by the court. We hold the District Court did not err by failing to remove guardian ad litem.

Affirmed.

/s/ Fred J. Weber
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ Diane G. Barz

/s/ John Conway Harrison

/s/ William E. Hunt

/s/ R.C. Mcdonough

Justice John C. Sheehy, dissenting:

It is improper and somewhat patronizing to assume that since the child is now placed with an Indian mother, though of a different tribe and territory, that the purpose of the Indian Child Welfare Act is fulfilled, and good cause shown for not assenting to the jurisdiction of the Eskimo tribe.

The very purpose of the Indian Child Welfare Act was to enable the several tribes to maintain their individuality and their cultures in a mobile and fast-changing national society. I daresay without investigation that the culture, mores, religious beliefs and mode of life is substantially different between the Eskimo tribe of the King Island Native Community and the Plains Indian Tribe to which the foster mother presumably belongs. The majority has determined "best interest" of the child lacking even a smidgeon of information of what the King Island Native Community has to offer. I would hold that the Eskimo tribe has a right to reach out and touch us where eligible members of the Eskimo tribe are concerned. One thing is certain: the culture of the Eskimos will not be preserved or prolonged in Montana. I believe you have to start with whale and seal meat, and the derivatives of these creatures, that made Eskimo life uniquely possible.

I would cede jurisdiction to the Eskimo tribe.

/s/ John C. Sheehy

B. ORDER DENYING REHEARING

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 90-057

IN THE MATTER OF T.S.)
) ORDER
A Youth in need of care.)

Appellant King Island Native Community has filed a petition for rehearing and respondent State of Montana has filed their response. Following our consideration of the same, we have concluded that it is advisable to revise our original opinion shown to have been decided on October 15, 1990.

IT IS ORDERED that the original opinion in this cause shown to have been submitted on briefs on August 23, 1990 and decided on October 15, 1990 is hereby withdrawn. In place of that opinion we have issued a replacement opinion which is shown to have been submitted on briefs on August 23, 1990 and decided on November 20, 1990.

The petition for rehearing is denied.

DATED this 20th day of November, 1990.

_____

CHIEF JUSTICE

C. ORIGINAL OPINION

NO. 90-057

IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990

IN THE MATTER OF T.S.
Youth in Need of Care.

APPEAL FROM: District Court of
the Tenth Judicial District,
In and for the County of Fergus,
The Honorable Peter L. Rapkoch,
Judge presiding.

COUNSEL OF RECORD:

For Appellant:
Daniel Duame; Kawerak, Inc.,
Nome, Alaska.
D. Michael Eakin; Montana Legal
Services Assn.; Billings, Montana

For Respondent:
Bradley B. Parrish; Lewistown,
Montana, Guardian ad litem
Marc Raciot; Attorney General,
Helena, Montana
Clay R. Smith; Asst. Attorney
General, Helena, Montana
Jon A. Oldenberg; Lewistown,
Montana

Submitted on Briefs: August 23, 1990
Decided: October 15, 1990

Justice Fred J. Weber delivered the Opinion of the Court.

King Island Native Community, an Eskimo

tribe located in Nome, Alaska, appeals from a judgment of the District Court, Tenth Judicial District, Fergus County, denying the Tribe's motion to transfer jurisdiction of child custody proceedings of any Eskimo child un the Indian Child Welfare Act. We affirm.

The issues presented are:

1. Did the District Court err when it held that there was good cause not transfer jurisdiction of child custody proceedings to King Island Tribal Court?

2. Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem expressed misgivings about the ICWA?

T.S. was born in Alaska to a mother who is part Eskimo and is eligible for membership in the King Island Native community (Tribe). Neither Mother nor T.S. is a member of the Tribe and neither have ever resided on the reservation during the lifetime T.S. The record reveals a long history of transient lifestyle which was punctuated with domestic violence and physical abuse during the marriage of Mother and Stepfather. The evidence indicated that Mother was abused by Stepfather and T.S. was abused by both Mother and Stepfather.

Mother and Stepfather were residing in Fergus County, Montana on August 31, 1988, when T.S. was placed in protective custody by the Montana Department of Family Services (Department). T.S. was three and a half years old at the time. A petition for temporary investigative authority was

filed and on December 2, 1988, the District Court appointed a guardian ad litem for T.S. and issued its order for protective services and order to show cause.

Shortly after T.S. was placed in a temporary foster home, Mother returned to Alaska. Mother contacted the Tribe and requested that the Tribe intervene in her case pursuant to the Indian Child Welfare Act (ICWA). On December 27, 1988, the Tribe filed a motion to intervene in the proceedings pursuant to 25 U.S.C. § 1911 (c) of the ICWA and intervention was granted the following day. On December 29, 1988, the Department of Family Services filed a petition for permanent legal custody of T.S. and for termination of Mother's parental rights. On February 21, 1989, the Tribe filed a motion to transfer jurisdiction to its tribal court pursuant to 25 U.S.C. §1911(b). Mother joined the transfer request on March 10, 1989. A hearing to determine the jurisdictional issue was held on July 19, 1989. The District Court denied the Tribe's best interests to transfer jurisdiction, and 2) it would constitute an undue hardship to the parties and witnesses in Montana to appear in tribal court in Alaska.

Did the District Court err when it held that there was good cause not to transfer jurisdiction of child custody proceedings to King Island Tribal Court?

Section 1911(a) and (b) of the Indian

Child Welfare Act states:

An Indian Tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of ether parent or the Indian custodian or the Indian child's tribe; **Provided**, That such transfer shall be subject to declination by the tribal court of such tribe. (Emphasis supplied.) 25 U.S.C. §1911(a), (b).

Since T.S. was not domiciled or residing within the reservation, subsection (b) applies which requires

transferring jurisdiction in the absence of good cause to the contrary. This Court has held that in cases that fall under subsection (b):

The burden of showing "good cause to the contrary" must be carried by the State with clear and convincing evidence that the best interests of the child would be injured by such a transfer, We direct the District Court to consider the guidelines for state courts established by the Department of the Interior in its determination, although in addition thereto the best interest of the child could prevent transfer of jurisdiction upon a "clear and convincing" showing by the State.
In the Matter of M.E.M Youth in Need of Care (1981), 195 Mont. 329, 336, 635 P.2d 1313, 1317.

The guidelines for state courts referred to in M.E.M. state:

Determination of Good Cause to the Contrary

(a) Good cease not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.

(b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

(i) The proceeding was at an advanced stage when the petition to transfer was

received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian Child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little nor no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer.
44 Fed.Reg. 67591 (1979)

These guidelines were drafted by the Bureau of Indian Affairs (BIA) and represent the Department of Interior's interpretation of what grounds would establish good cause. In the introduction, the Department of Interior states the guidelines are "not published as regulations because they are not intended to have binding legislative effect." 44 Fed. Reg. 67584 (1979). Courts are "free to act contrary to what the Department has said if they are convinced that the Department's guidelines

ar not required by the statute itself." Id. "Primary responsibility for interpreting..... Language used in the Act... rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child." Id.

In exercising this flexibility, this Court has determined that the "best interests of the child" test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children under § 1911(b). M.E.M. at 336, 635 P.2d at 1317.

The uncontroverted evidence at the hearing in this case strongly indicates that any transfer of T.S. from her present environment would "devastate" the child and would have long-term harmful effects upon her. This is the longest, most stable and protected environment she has ever known. The District Court properly considered the only loving environment T.S. has ever known in its application of the best interests test. She resides in a home the mother in Native American and fully capable and willing to teach T.S. about her Indian heritage. T.S. has adapted to her home and the family desires to adopt her as soon as possible.

The Tribe argues that there is a profound difference between the culture of

the Eskimo and the Indian culture of the foster mother and that difference makes it in T.S.'s best interests that jurisdiction be transferred. Section 1915(a) of the ICWA provides that , absent "good cause " to the contrary, adoptive placements are to be made preferentially with (1) members of the child's extended family, (2) other members of the same tribe, or (3) other Indian families. 25 U.S.C. § 1915(a). In this case T.S.'s maternal grandmother is unable to provide a home for T.S. and there are no other available family members known to the court. While members of the child's tribe would normally be the next preferred placement, in this case there is "good cause" not to place T.S. with the Tribe. The Tribe has not had contact with T.S. and has never shown any interest or concern for the living conditions that T.S. has been subjected to. The Tribe insists that it has had contact with T.S. and her Mother and also insists it has not intervened in T.S.'s behalf because it did not know of T.S.'s plight. The Tribe cannot have it both ways. There was no evidence in the record to indicated the Tribe has had any contact with T.S. or her Mother until it received notice of the pending matter in Montana courts. The District Court concluded that it was not to the child's best interest to remove her from the only stable, loving home she had known and send her to an isolated community with which she had never had previous contact. The District Court concluded that the placement of T.S.

with an Indian Mother had satisfied the preferential placement requirement. We agree.

In addition to the "best interests" test, this court has directed district courts to consider the BIA guidelines to determine good cause. M.E.M. at 336, 635 P.2d at 1317. The District Court here considered the guidelines. They were helpful. However, the District Court decided this case on its own merits which is proper.

In this case the District Court considered the BIA guidelines and determined that subsection (b)(iii) applies which states that good cause not tho transfer exists if the evidence necessary to decide the case could not be adequately presented to the court without undue hardship to the parities or the witnesses. 44 Fed. Reg. 67591 (1979). The witnesses and evidence upon which the Department of Family Services action was filed are all located in Montana. The District Court concluded that it would constitute an undue hardship if the parties and witnesses were required to travel from Montana in order to appear in the Tribal Court in Alaska. We conclude there is substantial evidence to support that conclusion.

The Tribe argues that a 1989 United States Supreme Court ruling mandates transfer of jurisdiction. Mississippi Band of Choctaw Indians v. Holy field,, No. 87-980, slip op. (U.S. Sup.Ct., Apr. 3, 1989,). Holyfield was a §1911(a) case

that dealt with the definition of "domiciled". Because of T.S. had not been domiciled on the tribal reservation in Alaska, we agree with the conclusion of the District Court that § 1911(a) and Holyfield do not control.

We hold that the District Court did not err in determining that he best interests of T.S. and undue hardship on parties and witnesses constitutes good cause not to transfer jurisdiction.

II

Did the District Court err when it failed to remove the guardian ad litem from the case when the guardian ad litem express misgivings about the ICWA?

The Tribe did not request the removal of the guardian ad litem and may not now predicate error on the District Court's failure to take such action. In addition, the District Court admonished the guardian ad litem that his thoughts on the ICWA were irrelevant and would be treated as such by the court. We hold the District Court did not err by failing to remove guardian ad litem.

Affirmed.

/s/ Fred J. Weber
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ Diane G. Barz

/s/ John Conway Harrison

/s/ William E. Hunt

/s/ R.C. Mcdonough

Justice John C. Sheehy, dissenting:

It is improper and somewhat patronizing to assume that since the child is now placed with an Indian mother, though of a different tribe and territory, that he purpose of the Indian Child Welfare Act is fulfilled, and good cause shown for not assenting to the jurisdiction of the Eskimo tribe.

The very purpose of the Indian Child Welfare Act was to enable the several tribes to maintain their individuality and their cultures in a mobile and fast-changing nation society. I daresay without investigation that the culture, more, religious beliefs and mode of life is substantially different between the Eskimo tribe of the King Island Native Community and the plains Indian Tribe to which the foster mother presumably belongs. The majority has determined "best interest" of the child lacking even a smidgeon of information of what the king Island Native Community has to offer. I would hold that he Eskimo tribe has a right to reach out and touch us where

eligible member of the Eskimo tribe are concerned. One thing is certain: the culture of the Eskimos will not preserved or prolonged in Montana. I believe you have to state with whale and seal meat, and the derivatives of these creatures, that made Eskimo life uniquely possible.

I would cede jurisdiction to the Eskimo tribe.

/s/ John C. Sheehy

D. TRIAL COURT OPINION

MONTANA TENTH JUDICIAL DISTRICT COURT,
FERGUS COUNTY
****

IN THE MATTER OF INQUIRY	)	
	)	
INTO T.S.	)	
	)	No.DJ 88-14
	)	
Youth In Need of Care	)	
	)	

MEMORANDUM ORDER
****

THIS MATTER came before the Court on the Motion To Transfer Jurisdiction of this matter to the King Island Native Community in Alaska. The Motion was filed by Torger S. Oaas who appeared on behalf

of the natural mother and the King Island Native Community (hereinafter Tribe) along with Daniel Duame, Attorney at Law, Nome, Alaska. Jon A. Oldenburg, Deputy Fergus County Attorney appeared on behalf of the Department of Family Services, and Bradley B. Parrish appeared as attorney and guardian ad litem for the child. There was a hearing conducted on the Motion, and the matter was thoroughly briefed and submitted to the Court.

The Tribe argues here that the Indian Child Welfare Act mandates a transfer of the jurisdiction of this case to the Tribal Court in Alaska. They have further argued that physical custody of the child, Teresa Sebwenna, should also be transferred to the Tribe. The case law in Montana, and the facts adduced at the hearing in this matter dictate otherwise.

The natural mother, Elizabeth McDonald and her husband Walter McDonald, were residing in Fergus County, Montana, on August 31, 1988, when Teresa was placed in protective custody by the Department of Family Services. A Petition for Temporary Investigative Authority was filed and on September 2, 1988, this Court issued its Order For Protective Services And Order To Show Cause. This Order was never challenged, and the jurisdiction of this Court over Teresa was not questioned until the tribe intervened in December of 1988.

The record herein reveals that although Elizabeth and Teresa are eligible for membership in the Tribe, they have never resided with the Tribe during

Teresa's life. The record reveals a long history of a transient life-style which was punctuated with domestic violence and physical abuse during the marriage of Walter and Elizabeth.

This Court recognizes the existence of the Indian Child Welfare Act and its applicability to the case at bar. That Act would in fact require the transfer of jurisdiction in this matter to the Tribe, "in the absence of good cause to the contrary." (See Section 101(b), Indian Child Welfare Act).

The Montana Supreme Court, In the Matter of M.E.M. Youth In Need of Care, (Mont. 1981) 635 P. 2d 1313, stated the rule that not only does this Court need to consider the non-binding "good cause" definition in the Federal Register, but must also consider the best interests of the child.

It is obvious from the testimony adduced at the hearing and the record herein that the Tribe showed little or no interest in Teresa and Elizabeth prior to this action being filed. There is a long and sad history of abuse and neglect of Teresa in the State of Alaska. There was also Social Service involvement with this family in Alaska with no intervention or help for Teresa by the Tribe. This creates a serious question in the mind of the Court about the motives of the Tribe in intervening at this time. On the one hand they assert that Elizabeth has maintained some kind of "contact" with the Tribe although she has never resided on

the reservation, while on the other hand admitting that they have had no knowledge (let alone contact) with this family because otherwise, they would have intervened in Teresa's behalf long ago. They can't have it both ways. And in the opinion of this Court there has never been contact of any kind between the Tribe and this family, whether it be actual physical contact or what could be deemed spiritual contact.

The Witnesses and testimony upon which the Department of Family Services action was filed here are all located in Fergus County, Montana. The evidence necessary to decide this case exists here in Fergus County, Montana, and it would constitute and undue hardship to the parties and witnesses here to appear in Tribal Court.

A further and compelling reason not to transfer jurisdiction of this case and Teresa to the Tribal Court is Teresa's best interests. Teresa has been domiciled in Montana since August of 1988. This is the longest, most stable and protected environment she has known her entire life. She now resides in a home where the mother is Native American and fully capable and willing to teach teresa about her Indian heritage. Teresa is adapted to her home now, and the family desires to adopt her as soon as possible.

The uncontroverted evidence at the hearing in this matter indicated strongly that any transfer of this child from her present environment would "devastate " the

child and would have long-term harmful effects upon her. The evidence is overwhelming that the "best interests" of Teresa will be best served by leaving jurisdiction of her and this case in this Court.

The Motion of the Tribe to transfer jurisdiction is hereby denied.

DATED THIS 4th day of December, 1989

/s/ PETER L. RAPKOCH
JUDGE OF THE DISTRICT COURT

E. TRIAL COURT DOCKET SHEET

Docket for Dependent and Neglected Children
IN THE MATTER OF INQUIRY INTO
T.S., Youth in Need of Care

Jon A. Oldenburg, Deputy County Attorney
Bradley B. Parrish Guardian ad Litem
Torger S. Oaas, Court appointed for mother
D. Michael Eakin for Montana Legal Services for King Island Native Community.

DJ-88-14

WHEN FILED	PAPERS FILED

1. SEPT.2, 1988 PETITION FOR TEMPORARY INVESTIGATIVE AUTHORITY AND PROTECTIVE SERVICES
" 2, " ORDER FOR PROTECTIVE SERVICES AND ORDER TO SHOW CAUSE SEPT.20 AT 9:30, ISSUED
" 16, " ORDER FOR PROTECTIVE SERVICES AND ORDER TO SHOW CAUSE, RETURNED
2." 20, " MINUTE ENTRY ORDER TO ISSUE
3." 22, " SERVICE TREATMENT AGREEMENT BETWEEN ELIZABETH MCDONALD AND FERGUS COUNTY DEPARTMENT OF FAMILY SERVICES
4." 28, " ORDER (COPIES GIVEN)
OCT. 7, " MINUTE ENTRY - TORGER OAAS COURT APPOINTED
5.DEC. 27, " MOTION TO INTERVENE
6. " 27, " MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
7. " 28, " ORDER (COPIES TO COUNSEL)
8. " 29, " PETITION FOR PERMANENT LEGAL CUSTODY AND TERMINATION OF PARENTAL RIGHTS
9." 29, " NOTICE OF HEARING - FEB.7 AT 9:00
FEB. 7, 1989 MINUTE ENTRY, ORDER TO ISSUE FEB. 23, AT 9:00
10." 17, " MOTION TO REQUIRE DEPARTMENT OF FAMILY SERVICES TO FOLLOW PROVISIONS OF

			41-4-101 ET. SEQ. MCA
11."	21,	"	MOTION TO TRANSFER JUVENILE OF THIS CASE TO KING ISLAND NATIVE COMMUNITY
12. "	21,	"	BRIEF IN SUPPORT OF MOTION TO TRANSFER JURISDICTION
13."	22,	"	RESPONSE TO MOTION TO TRANSFER
"	23,	"	MINUTE ENTRY (30 DAYS GIVE TO JUDGE BRIEFS AND ANSWERS)
14.MARCH	10,	1989	MOTION AND BRIEF
15."	10,	"	BRIEF ON LAW RELATION TO INDIAN CHILD WELFARE ACT
16."	17,	"	RESPONSE BRIEF ON LAW RELATING TO INDIAN CHILD WELFARE ACT
17."	3,	"	REPLY TO RESPONSE BRIEF ON LAW RELATING TO INDIAN CHILD WELFARE ACT
JULY	11,	"	MINUTE ENTRY - HEARING JULY 19 AT 3:30
"	19,	"	MINUTE ENTRY - RESPONDENT EXHIBIT 1 ADMITTED. MATTER TAKEN UNDER ADVISEMENT
18."	26,	"	REPORT TO THE COURT BY GUARDIAN AD LITEM
18. 1/2 AUG.	2,	"	RECENT APPLICABLE LAW
19. "	15,	"	RESPONSE BRIEF ON DEPARTMENT OF FAMILY SERVICES

20.	SEPT. 5,	"	REQUEST FOR EXPEDITED RULING
21.	" 15,	"	RESPONSE BRIEF ON GUARDIAN AD LITEM
22.	" 29,	"	TRIBES RESPONSE TO RESPONSE BRIEF ON GUARDIAN AD LITEM
23.	DEC. 4,	"	MEMORANDUM ORDER (COPIES TO COUNSEL)
23 1/2	" 5,	"	PETITION FOR WRIT OF SUPERVISORY CONTROL
23 3/4	" 5,	"	NOTICE OF APPEARANCE OF MONTANA LEGAL SERVICES
24.	" 5,	"	ORDER (COPIES TO COUNSEL AND SUPREME COURT)
25.	" 13,	"	MOTION TO RECONSIDER
26.	" 13,	"	NOTICE OF HEARING ON MOTION TO RECONSIDER (JAN. 9 AT 2:00 P.M.)
	" 13,	"	SUBPOENA, ISSUED
27.	" 13,	"	COPY OF SUPREME COURT ORDER DATED DEC. 6,1989
28.	" 14,	"	RESPONSE TO MOTION TO RECONSIDER
29.	" 21,	"	ORDER DISMISSING PETITION FOR WRIT (FROM SUPREME COURT)
	JAN. 9,1990		MINUTE ENTRY MOTION TO RECONSIDER DENIED
30.	" 29,	"	NOTICE OF APPEAL (COPIES TO COUNSEL AND SUPREME COURT)

31. " 29, " REQUEST FOR RECORD ON APPEAL (COPIES SENT TO COUNSEL AND SUPREME COURT)

F. AFFIDAVIT RE: MEMBERSHIP

State of Alaska)
Second judicial District)

AFFIDAVIT OF MIKE SACLAMANA

I, Mike Saclamana, being first duly sworn, hereby depose and say as follows:

1. I am a member of the King Island Native Community, and am a memberof the King Island IRA Council and Tribal Court.

2. I, and our IRA Council have been actively involved in the case of Elizabeth McDonald and her daughter Theresa (Montana District Court case No. DJ-88-14) since we first recieved notice of this case late in 1988.

3. Under our Ordinance No. 87-01, Elizabeth McDonald is considered to be a member of the King Island Native Community and her daughter is therefore eligible for membership.

5. Although Elizabeth and her family have spent the last residing in Anchorage, Alaska, the Tribe and various family members have maintained contact with the family.

5. The King Island Native Community has requested that the case referenced above be transferred to the King Island Tribal Court.

6. Under Federal law (the Indian Child Welfare Act) and the laws and

customs of the King Island Native Community our Tribal Courthas jurisdiction over both Elizabeth and Theresa and the subject matter of this case.

7. Upon an Order by the Fergus County District Court transferring this case to the King Island Tribal Court, our Tribal Court is prepared to issue an immediate Custody Order and send a tribal representative to Montana to bring Theresa back to Alaska where she will be paced in an appropriate Native foster home, pending disposition of this matter.

Dated 3/30/89 /s/ Mike Saclamana
Mike Saclamana
IRA Councilman
(Seal) Tribal Court Judge
King Island Native
Community

SUBSCRIBED AND SWORN TO before me this 30th day of March, 1988, at Nome, Alaska.

Doris E. Kalake
Notary Public for the
State of Alaska
My Commission Expires:
4/26/92

G. EXCERTS FROM THE TRANSCRIPT
IN THE SUPREME COURT OF THE
STATE OF MONTANA
1990

IN THE MATTER OF T.S. Cause No.
Youth in Need of Care. DJ-89-14

TRANSCRIPT ON APPEAL
BEFORE THE HONORABLE PETER L. RAPKOCH

JUDGE OF THE DISTRICT COURT
Wednesday, July 19, 1989
3:30 o'clock p.m.
APPEAL FROM THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF FERGUS
REPORTED BY: AUDREY C. PETERSEN
Pages 44-45:

Q (by Mr Oaas) Prior to December of 1988, is it true that Dan Duame asked you to voluntarily turn Teresa Sebwenna over to the jurisdiction of the tribal court?

A [Jim Simonich, a socialworker for Fergus County] He said something to that effect.

Q That was sometime between August of 1988 and December of 1988?

A Probably closer to December.

Q Were you in regular contact with Dan Duame during this period of time?

A Pretty much. I made several phone calls to him.

Q He made several phone calls to you?

A Yes.

Q Appeared interested in the proceedings?

A He just wanted to know what we were doing down here.

Q Okay. At some point in time between August of '88 and December of '88 he requested that you voluntarily relinquish the child to the jurisdiction of the tribal court?

A Yes, he did.

Q You refused to do that?

A Yes, I did.

Q Why?

A It's not in the child's best interests to transfer up there.

Q At that time why was it not in the child's best interests?

A The same reasons they are now. There's no reason to transfer her to Alaska. What would be the reason to transfer up there?

Page 50:

Q Sometime between August of '88 and December of '88 did Dan Duame asked you to enter into an Interstate Compact for the placement of Teresa under the Interstate Compact under the laws of Montana?

A He brought something up about it once, if we would be willing to do something like that.

Q He asked if you would be willing to do

something like that?

A I think that was basically what he asked yeah.

Q What was your response?

A At that point in time, no.

Q Why?

A It's not in Teresa's better interests to transfer her up there.

Page 51:

Q So the transfer to the Napier didn't occur until March of 1989?

A Right.

Q That would have been after the date that the King Island Native Community intervened in this case, after February 30th, I believe, 1989, is that correct?

A Yes.

Q The placement in the Napier home, obviously, but for the record I'm going to ask, occurred after you declined to enter into an Interstate Compact involving Teresa Sebwenna with Alaska, and after you refused to voluntarily return the child to the tribe?

A It came after I refused to do that, is

that what you're saying?

Q Right.

A Yeah. Datewise it came after I refused. Yeah. sure.

Hearing of January 9, 1990, p. 24-26

BY MR. EAKIN:

Q Mr. Perrish, (the Guardian ad Litem), in the brief you filed in this court you called the Holyfield a grotesque miscarriage of justice?

A I said it was grotesque, I didn't say it was a miscarriage of justice, did I?

Q Okay. Maybe you deny it. You called it grotesque?

A I think I called the result grotesque.

Q Did you say that it would be a miscarriage of justice for this Court to follow that decision?

A I don't know. You've got it in front of you, you know what it says. What do you want, me to quote it word-for-word?

Q Is it still your opinion that the Holyfield decision is grotesque?

Mr. Oldenburg: Your Honor, I fail to see the relevance in this reference.

Mr. Parrish: I object on that same basis, what's the relevance?

Mr. Eakin: The relevance is that the guardian ad litem is hostile and biased against the Indian Child Welfare Act. This information was not available because these statements were not made until September. If there is a bias on the part of the guardian ad litem, I don't think there's been a fair hearing on whether to transfer jurisdiction or not if the Court has considered the recommendations of the guardian ad litem.

Mr. Parrish: May I respond, Judge?

The Court: You may.

Mr. Parrish: Judge, this Court knows very well the powers of a guardian ad litem are very broad. If a guardian ad litem may not take positions, whether that's contrary to Act of the United States government, the state government, when the guardian ad litem feels that those hinder and are in total opposition of the child, the guardian is appointed to defend, then the guardian is not doing his job. I do not believe that this Act as applied to this child, that Act does not apply in this case and is the antithesis of this child as opposed to the children in the Mississippi case as the way Mr. Duame is trying to apply it in this case.

H. EXCERPTS: REPLY BRIEF OF GUARDIAN AD LITEM

MONTANA TENTH JUDICIAL DISTRICT
COURT, FERGUS COUNTY
****

IN THE MATTER OF)
T.A.S)
A YOUTH IN NEED OF CARE.)
****

RESPONSE BRIEF OF GUARDIAN AD LITEM

***

ARGUMENT: It is the opinion of the

Guardian ad Litem that the Indian Child Welfare Act is unnecessarily and monumentally overbroad. Congress could never have intended that he States should lose their jurisdiction over Indian children physically within their geographical limits. Nor could Congress have intended that Indian children would not enjoy the same rights granted to white children by the U.S. Constitution and by the Constitution's of the individual States. But that is what the counsel for the mother, the counsel for the tribe, and the Court in the Mississippi case would have us believe. ***

If this Court rules that the Youth herein must be sent to the tribe in northern Alaska than, in effect, the basic rights granted to this child under the Montana Constitution totally evaporated. The Court would be saying that because she

is an Indian child she can not avail herself of the services provided by the State of Montana to insure that she can be safe, healthy, and happy within the boarders of the State of Montana. The Court would be saying that she no longer is free from discrimination because she happens to be an Indian child. And the Court would be saying the Section 15 of Article II is a nullity as it applies to this Youth and that she is not entitled to the fundamental rights of Article II Section 15 because she happens to be an Indian under the age of 18 years.

It is the opinion of the Guardian ad Litem that such a ruling would not only be against the best interests of the Youth, but would be as grotesque as the holding in the Mississippi case.

***

RESPECTFULLY SUBMITTED this 14th day of September, 1989.

BRADLEY B. PARRISH
Guardian ad Litem for Youth

I. SELECTED PORTIONS OF THE INDIAN CHILD WELFARE ACT

§ 1901 CONGRESSIONAL FINDINGS

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds -

(1) that clause 3, section 8, article I of the United States Constitution [USCS Constitution, Art.I, § 8, cl 3] provides the "The Congress shall have Power. . . To regulate Commerce. . . with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are member or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relation of Indian people and the cultural and social standards prevailing in Indian communities

and families.
(Nov. 8, 1978, P.L. 95-608,§2, 92 Stat.3069.)

CHILD CUSTODY PROCEEDINGS

§1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) **Exclusive jurisdiction.** An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b)**Transfer of proceedings;declination by tribal court.** In any State court proceeding for the foster care placement of, or termination of parental rights to, and Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provide, That such transfer shall be subject to declination by the tribal court of such tribe.

(c)**State court proceedings; intervention.** In any State court proceeding for the

foster care placement of, or termination of parental rights to, and Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.
(d)**Full faith and credit to public acts, records, and judicial proceedings of Indian tribes.** The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.
(Nov.8, 1978, P.L. 95-608, Title I, §101, 92 Stat. 3071.)

§ 1912. Pending court proceedings
(a) **Notice; time for commencement of proceedings; additional time for preparation.** In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, and Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the

tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) **Appointment of counsel.** In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13) [25 USCS §13].

(c) **Examination of reports or other documents.** Each party to a foster care

placement or termination of parental rights proceeding under State law involving an Indian child shall have the right to examine all reports or other documents filed with the court upon which any decision with respect to such action may be based.

(d) **Remedial services and rehabilitative programs; preventive measures.** Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

(e) **Foster care placement orders; determination of damage to child.** No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent of Indian custodian is likely to result in serious emotional or physical damage to the child.

(f) **Parental rights termination order; evidence; determination of damage to child.** No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that he continued custody of

the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (Nov. 8, 1978, P.L. 95-608, Title I, §102, 92 Stat. 3071.)

§ 1915. Placement of Indian children

(a) Adoptive placements; preferences. In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

(1) a member of the child's extended family;

(2) other member of the Indian child's tribe; or

(3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with -

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's need.

(c) **Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences.** In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency of court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the court or agency shall give weight to such desire in applying the preferences.

(d) **Social and cultural standards applicable.** The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) **Record of placement; availability.** A record of each such placement, under State law, of and Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section, Such record shall be made available at any time upon

the request of the Secretary or the Indian child's tribe.
(Nov. 8, 1978, P.L. 95-608, Title I, §105, 92 Stat. 3073.)2